Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Petition of ViSalus, Inc., for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(2), (a)(3), and (f)(8)	CG Docket No. 02-278

PETITION FOR RECONSIDERATION IN NON-RULEMAKING PROCEEDING

Lori Wakefield ("Wakefield") hereby petitions the Commission to reconsider its order granting ViSalus, Inc. a retroactive waiver of certain Commission rules regarding prior express consent under the Telephone Consumer Protection Act (the "Order," attached as Exhibit 1).

In September 2017, Petitioner ViSalus, Inc. sought a retroactive waiver (the "Petition") of the prior-express-written-consent rules established by this Commission in its 2012 order *In re Rules and Regulations Implementing the Telephone Consumer Protection Act*.[1] The request was premised on the assertion that ViSalus had received, prior to October 16, 2013, valid written consent to call individuals using prerecorded messages.[2] The Commission ultimately granted ViSalus's petition, retroactively waiving the requirement that any *written* consent must be explicit that it is consent to receive calls made using an autodialer or featuring an artificial or prerecorded voice.[3] The Commission should reconsider that Order in light of subsequent developments in related litigation between Wakefield and ViSalus.

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1 27 FCC Rcd. 1830.
2 Petition at 7.
3 Order ¶ 16.

First, as discussed extensively in ViSalus's Petition, ViSalus's calling practices were the subject of active litigation.[4] But at the time ViSalus filed its Petition, it had not alleged that it obtained consent to robocall members of the class certified in the *Wakefield* litigation.[5] Six months *after* filing the Petition, ViSalus moved to amend its Answer to assert consent as a defense, a motion Wakefield opposed, noting, among other things, that discovery had closed and that ViSalus, despite protestations to the contrary, had never produced any evidence that any class member consented to receiving telephone solicitations featuring a prerecorded voice.[6] ViSalus's motion did not mention the pending Petition, or assert that ViSalus believed it had received consent consistent with the Commission's pre-2013 rules or pre-2013 case law interpreting the term "prior express consent." In fact, as Wakefield explained in opposing ViSalus's proposed amendment, the record reflected that ViSalus did not keep records purporting to show *when* any class member provided consent of any kind.[7] Thereafter, and after the period for comment on ViSalus's Petition had closed, ViSalus *withdrew* its motion to amend,

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4 See Petition at 2-3, 7-8 (discussing *Wakefield v. ViSalus Inc.*, No. 15-cv-1857 (D.Or.)).

5 For this reason, Wakefield was uncertain that she was an "interested person" entitled to comment on ViSalus's Petition. Absent further guidance from an agency, an "interested person" is ordinarily someone who would have standing to seek judicial review of an agency action. *Nichols v. Bd. of Trustees of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 896 (D.C. Cir. 1987). Because ViSalus had not defended against Wakefield's claims by asserting that it had obtained prior express consent to call her, her interests would not be affected by the Commission's actions. Moreover, as Wakefield later testified at trial, she had not provided ViSalus with any consent to call her at all. ViSalus has never even attempted to rebut this testimony. Thus, a decision by the Commission not to enforce its own rules against ViSalus would be of no moment for her claim, because ViSalus had no evidence that she had consented to be robocalled *at all*. As such, she did not participate earlier in this proceeding. *See* 47 C.F.R. § 1.106(b). Following the Commission's action, however, ViSalus raised the Order as a bar to certain forms of relief in the *Wakefield* action. Moreover, this Petition for Reconsideration is based on representations made and events occurring subsequent to ViSalus's Petition, which the Commission did not have an opportunity to review.

6 *Wakefield v. ViSalus Inc.*, No. 15-cv-1857, ECF Nos. 133 (Motion to Amend) (filed July 13, 2018), 138 (Opposition to Motion to Amend), at 13-14 (filed July 20, 2018).

7 *Wakefield*, No. 15-cv-1857, ECF No. 138, at 14 n.2.

asserting that it did not intend to offer evidence of consent as to *any* class member and that "ViSalus … does not claim that … Plaintiff's or the class's claims are barred by them giving ViSalus prior express written consent."[8] That representation to the Oregon district court directly contradicts statements made in ViSalus's Petition, and relied upon by the Commission, that class members had "provided ViSalus in writing with their prior express consent to be called."[9]

At the ensuing trial (which occurred earlier this year), ViSalus offered no evidence of consent, and, to the contrary, made clear that it called individuals regardless of whether it had obtained consent to be called. As ViSalus's petition shows, it offered individuals several options regarding how they wished to be contacted.[10] For "promoters" (individuals within ViSalus's multi-level marketing operation who sold products) who filled out a hard copy form, ViSalus asked individuals to provide their number and then separately asked individuals how they wished to "Receive ViSalus News & Updates," i.e., by "Phone," "Email," "Mobile Text Message," or "None." But trial testimony established that ViSalus built calling lists without regard for these stated communication preferences, instead building calling lists exclusively around which individuals "qualified" for a given offer.[11] Even before the 2012 Order, courts had held that "express consent is consent that is clearly and unmistakably stated."[12] Interpreting the pre-2013 standard for obtaining consent, courts have noted that "consent must be considered to relate to

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8 *Wakefield*, No. 18-cv-1857, ECF No. 145 (Limited Reply and Notice of Withdrawal of Motion to Amend Answer), at 2 (filed July 27, 2018).

9 Petition at 8; see Order ¶ 14.

10 Petition at 2 nn.1-2.

11 *Wakefield*, No. 18-cv-1857, ECF No. 265-2 (trial-designated testimony of ViSalus's Compliance Director), at 31:2-9 (averring that the list of people who get contacted in a particular calling campaign is a "function of the [particular] promotion as to who qualifies for that"), 184:17-185:9 (averring that a prerecorded message would have been sent to "customers who qualified for that offer").

12 *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (cleaned up) (citing Black's Law Dictionary 323 (8th ed. 2004).

the type of transaction that evoked it," and, thus, the provision of a telephone number to a business does not, under the TCPA, constitute "consent[] to any and all contact … irrespective of purpose."[13] An individual who has expressed no interest in receiving communications from ViSalus, or who has expressed a desire to be contacted only by email has not "clearly and unmistakably" consented to receiving telephone solicitations featuring an artificial or prerecorded voice. Moreover, ViSalus never informed individuals that ViSalus might call them using an artificial or prerecorded voice, and as to promoters never informed them that they might solicit them via telephone. Even before 2013, courts had required both of those things before deeming purported consent to be sufficient under the TCPA outside of the debt-collection context.[14]

Unsurprisingly, ViSalus did not prevail at trial. Before trial, the parties determined that the class certified by the Oregon district court (and highlighted in the Petition) encompassed a series of ViSalus calling campaigns that ultimately totaled around 4.2 million calls. The jury found that Wakefield proved that ViSalus had made around 1.85 million unlawful calls featuring an artificial or prerecorded voice.

In a post-verdict filing, ViSalus produced heavily redacted forms (previously withheld during discovery) that it says demonstrate that it received consent to call approximately 30 individuals (though for only a fraction of these individuals did ViSalus obtain consent to contact that person for anything resembling telemarketing purposes). Because the records are so heavily redacted, it is unclear if these records correspond to class members. Neither is it apparent if

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13 *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1045 (9th Cir. 2017).

14 *See Thrasher-Lyon v. CCS Commercial, LLC*, 2012 WL 3835089, at *3 (N.D. Ill. Sept. 4, 2012).

ViSalus even relied on these records to later robocall these individuals. It also is unclear if ViSalus has any further records purporting to show that individuals consented to be called.

These new facts demonstrate that reconsideration of the Commission's order is warranted. At a minimum, it is clear that ViSalus is not similarly situated to bebe stores, who also received a waiver. As bebe made clear in its own filings, when customers enrolled in the clubbebe program, they consented to "the use of [their] personal information … for marketing and promotional purposes."[15] As bebe made clear, that language was key and meant that bebe was not arguing that mere provision of a number to bebe constituted consent to be autodialed.[16] ViSalus, by contrast, lacked similar language for many of the individuals it called, and, instead, appears to have interpreted consent to be contacted regarding "ViSalus news" as consent to any and all contact by ViSalus, irrespective of purpose, including solicitations. But as ViSalus later acknowledged, it did not have evidence of that consent. That distinguishes ViSalus from many of the entities that have received a retroactive waiver.[17] Because ViSalus's later admissions to the district court undermine the basis for its Petition, the Commission should reconsider its order, and deny ViSalus's Petition.

More importantly, however, the evidence presented at trial regarding ViSalus's calling practices makes clear that its earlier averments of "confusion" were hollow. ViSalus was not under any genuine confusion about the scope or applicability of the Commission's rules. Instead, ViSalus essentially ignored them, creating calling lists based on purchase history, or other factors, irrespective of whether the company had obtained any kind of consent to robocall

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15 bebe Reply in Support of Petition for a Retroactive Waiver, at 2.

16 bebe Reply in Support of Petition for a Retroactive Waiver, at 7.

17 *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2016 Waiver Order)*, 31 F.C.C. Rcd. 11643, ¶ 15 (2016).

individuals. While the Commission has, in the past, not required companies to substantiate any claimed confusion about the TCPA's rules,[18] the Commission has always noted the absence of evidence to refute any claimed confusion,[19] as it did in the ViSalus Order.[20] But the Commission's waiver orders have never said that the Commission would ignore evidence that might refute a claim of confusion. Because the post-Petition evidence presented at trial undermines ViSalus's contention that it was confused, the Commission should reconsider its order, and deny ViSalus's Petition.

Respectfully submitted,

LORI WAKEFIELD,

Dated: July 15, 2019

/s/ Rafey S. Balabanian

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18 See id. ¶ 16.
19 Id. ¶ 13.
20 Order, ¶ 13.

EXHIBIT 1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	
Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement	)	

ORDER

Adopted: June 13, 2019 **Released: June 13, 2019**

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this order, we grant limited waivers of the Commission's prior-express-written-consent rules to two petitioners, bebe stores, inc. and ViSalus, Inc., in light of confusion about the rules and consistent with the Commission's prior grant of similar waivers.[1] Specifically, we find good cause exists to find that bebe and ViSalus needed additional time to obtain updated written consent in compliance with the Commission's 2012 rule changes, which were adopted under the Telephone Consumer Protection Act (TCPA) to ensure that telemarketers have proof of consent from consumers to make robocalls.[2] As discussed more fully below, these waivers only apply to calls for which the petitioner had obtained some form of *written* consent. We emphasize that the petitioners should already be in full compliance with the Commission's requirements for any calls made 90 days or more after the Commission's 2015 clarification of the written-consent rule because they had the benefit of that clarification in making such calls.

[1] *See Petition for Expedited Declaratory Ruling Granting a Limited, Retroactive Waiver of 47 CFR § 64.1200(a)(2) of the Federal Communications Commission's Rules,* CG Docket No. 02-278, filed by bebe stores, inc. (filed Nov. 18, 2016) *(bebe Petition); Petition for Retroactive Waiver and Request for Expedited Ruling*, CG Docket No. 02-278, filed by ViSalus, Inc. (filed Sept. 14, 2017) (*ViSalus Petition*); *see also* Letter from Glenn S. Richards and Amy L. Pierce, counsel for bebe stores, inc., to Marlene H. Dortch, Secretary, FCC, CG Docket no. 02-278, at 2-8 (filed Mar. 9, 2017) (*bebe Ex Parte)*.

[2] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The Commission's implementing rules are codified at 47 CFR § 64.1200.

II. BACKGROUND

A. The Telephone Consumer Protection Act and Commission's Rules

2. In 1991, Congress enacted the TCPA to address a growing number of telephone marketing calls and other calling practices that can be an invasion of consumer privacy. Before the Commission's 2012 revisions, the Commission's implementing rules, in relevant part, prohibited: (1) making telemarketing calls using an artificial or prerecorded voice to *residential* telephones without prior express consent; and (2) making any non-emergency call using an automatic telephone dialing system ("autodialer") or an artificial or prerecorded voice to a *wireless* telephone number without prior express consent.[3] The consent could be provided in either oral or written form.[4]

3. In 2012, the Commission made its rules consistent with the parallel Federal Trade Commission (FTC) rules by requiring, among other things, prior express *written* consent for all autodialed or prerecorded telemarketing calls to wireless numbers and for all prerecorded telemarketing calls to residential lines.[5] Additionally, the Commission required that any request for a consumer's written consent to receive telemarketing robocalls must include the telephone number to which the consumer authorizes such telemarketing messages to be delivered, and clear and conspicuous disclosures informing the consumer that: (1) the consumer authorizes the seller to deliver telemarketing calls to that number using an automatic telephone dialing system or an artificial or prerecorded voice; and (2) the consumer is not required, directly or indirectly, to provide written consent as a condition of purchasing any property, goods, or services.[6] The 2012 rule changes became effective on October 16, 2013.[7]

4. Immediately after the effective date of the 2012 rule changes, two parties, the Direct Marketing Association (DMA) and the Coalition of Mobile Engagement Providers (Coalition), filed petitions asking the Commission, respectively, to forbear from enforcing the new written consent requirements when noncompliant written consent had already been obtained and to clarify that the revised rules did not nullify noncompliant written consent (*i.e.,* consent that did not meet the new 2012 requirements) obtained prior to the effective date of the revised rules.[8]

5. In its *2015 TCPA Declaratory Ruling*, the Commission clarified the application of the 2012 rule change, saying that the new requirements apply "*per call* and … telemarketers should not rely on a consumer's written consent obtained before the 2012 rules took effect."[9] Addressing the DMA and Coalition petitions in the *2015 TCPA Declaratory Ruling,* the Commission recognized that special circumstances warranted a deviation from strict enforcement of the revised prior-express-written-consent rules. It therefore provided the two petitioners, and their members, with temporary relief by granting retroactive waivers to those parties that allowed them to rely on previously obtained written consents for a limited period of time. During that time, the petitioners did not have to obtain new consent after making

[3] *See* 47 CFR §§ 64.1200(a)(1)-(2) (2011). This restriction also applied to such calls directed to emergency numbers and other specified locations.

[4] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1833, para. 7 (2012) (*2012 TCPA Order*).

[5] *Id.* at 1838, para. 20.

[6] 47 CFR § 64.1200(f)(8); *see also 2012 TCPA Order,* 27 FCC Rcd at 1844, para. 33.

[7] *See* 77 Fed. Reg. 63240 (Oct. 16, 2012).

[8] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8012-13, para. 98 (2015) (*2015 TCPA Declaratory Ruling*).

[9] *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8014, para. 100.

the required disclosures from these same consumers.[10] In reaching its decision, the Commission concluded that there was evidence in the record that petitioners could have been confused as to whether written consent obtained previously would remain valid after the new rules became effective. The Commission therefore found it reasonable to recognize a limited period of time within which the parties could be expected to obtain the prior express written consent as required by the 2012 rules, including the necessary disclosures.[11] Consequently, the Commission granted the petitioners and their members a retroactive waiver from the original effective date of the rules, October 16, 2013, to release date of the *2015 TCPA Declaratory Ruling* (which was July 10, 2015), and then a waiver from the release date of the *2015 TCPA Declaratory Ruling* through a period of 89 days (or until October 7, 2015), during which the affected parties were allowed to rely on the previously obtained prior express written consents already provided by their consumers before October 16, 2013.[12] After October 7, 2015, the petitioners and their members were required to be in full compliance with the Commission's requirements for each subject call.[13]

6. Subsequently, the Consumer and Governmental Affairs Bureau (Bureau), acting on delegated authority, granted waivers to seven additional petitioners that demonstrated they were similarly situated to the DMA and Coalition.[14] The Bureau found that there was good cause to waive the Commission's rules as to each of the seven petitioners and find that they needed additional time to obtain updated written consent in compliance with the Commission's 2012 rule changes.[15] In granting the limited retroactive waivers, the Bureau found that special circumstances warranted granting a waiver to each petitioner. As the Commission had previously stated in the *2015 TCPA Declaratory Ruling*, the Bureau concluded that there was confusion about the 2012 prior-express-written-consent rule changes because they could reasonably have been interpreted to mean that written consent obtained prior to the *2012 TCPA Order* was still valid.[16] Each of the seven petitioners asserted that there was industry-wide confusion after the *2012 TCPA Order* went into effect, that they would need more time to obtain new consents under the *2012 TCPA Order*, and that they would benefit from a retroactive waiver.[17] Each of the petitioners demonstrated that they incorrectly but reasonably interpreted the Commission's *2012 TCPA Order* by citing that order's language and the lack of evidence to refute their claimed confusion.[18] Finally, just as the Commission did not require proof of actual confusion for the DMA or the Coalition, the Bureau did not require proof of actual confusion from the seven petitioners granted waivers in October, 2016.[19]

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[10] *Id.* at 8014, para. 100; 47 CFR §§ 64.1200(a)(2), (f)(8); *see also* 47 CFR § 64.1200(a)(1)(iii); *2012 TCPA Order,* 27 FCC Rcd at 1843-44, paras. 32-33; *2015 TCPA Declaratory Ruling,* 30 FCC Rcd at 8012-15, paras. 98-102.

[11] 30 FCC Rcd at 8014, para. 101.

[12] *Id.* at 8014-15, para. 102.

[13] *Id.*

[14] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement,* CG Docket No. 02-278, Order, 31 FCC Rcd 11643, 11647-48, paras. 10, 12 (CGB 2016) (*2016 Waiver Order*).

[15] *Id.* at 11648, paras. 11-12.

[16] *Id.* at 11648-49, para. 13.

[17] *Id.* at 11648, para. 12 & n. 45.

[18] *Id.* at 11648-49, para. 13

[19] *2015 TCPA Declaratory Ruling,* 30 FCC Rcd at 8014-15, paras. 100-02; *2016 Waiver Order,* 31 FCC Rcd at 11650, para. 16.

B. The bebe and ViSalus Petitions

7. Bebe and ViSalus filed petitions seeking similar waivers after the Bureau's *2016 Waiver Order*. In general, these petitioners contend they are similarly situated to the parties who received waivers in the *2015 TCPA Declaratory Ruling* and the *2016 Waiver Order*.[20] Specifically, they assert that they faced similar confusion and needed additional time to obtain new consents under the 2012 rules without running the risk of being subject to litigation.[21] They also contend they would benefit from the same additional time granted for compliance with the 2012 prior-express-written-consent requirements.[22]

8. The Commission sought comment on the petitions.[23] There were no comments filed regarding the *ViSalus Petition*. Parties in the litigation against bebe (the Meyer parties) filed an opposition to the *bebe Petition*.[24] Bebe filed reply comments in response.[25]

9. Opponents of the *bebe Petition* argue that bebe is not similarly situated to the prior waiver recipients because: (1) bebe has not established and/or cannot establish that it has received prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers;[26] (2) bebe improperly suggests that the mere provision of telephone numbers to a caller constitutes written consent;[27] (3) bebe seeks relief only because it has been sued for violating the TCPA and seeks to evade potential liability and circumvent the court's class certification order;[28] (4) bebe seeks to avoid making an evidentiary showing regarding consent;[29] and (5) the requested waiver would far exceed the scope of previous waivers by covering calls made both to phone numbers obtained in writing and also to phone numbers obtained through oral exchanges at a point of sale.[30]

10. In response to these arguments, bebe asserts that the Meyer parties and other similarly situated individuals provided the requisite consent to being called by bebe prior to October 16, 2013 when they enrolled in bebe's loyalty program, continued their membership in that program, and enjoyed the

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[20] *See bebe Petition* at 1, 8, 10; *ViSalus Petition* at 1, 3-4.

[21] *Bebe Petition* at 5, 10-11; *ViSalus Petition* at 2-4, 7-8.

[22] *Bebe Petition* at 11; *ViSalus Petition* at 8.

[23] *See Consumer and Governmental Affairs Bureau Seeks Comment on a Petition for Retroactive Waiver Filed by bebe Stores, Inc.*, CG Docket No. 02-278, Public Notice, 31 FCC Rcd 12767 (CGB 2016); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Retroactive Waiver Filed by ViSalus, Inc. Under the Telephone Consumer Protection Act*, CG Docket No. 02-278, Public Notice, 33 FCC Rcd 6027 (CGB 2018).

[24] A list of commenters can be found at Appendix A. There were no comments filed regarding the *Visalus Petition*. There was an opposition filed by the Meyer parties to the *bebe Petition,* and bebe filed reply comments. We address the issues raised in the petitions, opposition and reply comments *infra.*

[25] *See* Appendix A; *see also bebe Ex Parte.*

[26] Opposition to the *bebe Petition* at 4. In fact, the opponents state that bebe's corporate designees have testified that no written disclosures were made, and no written consent was obtained, when the cell phone numbers were communicated to bebe's employees at the point of sale. *Id.* at 4-5.

[27] *Id.* at 4. The *Meyer* opponents cite to the *bebe Petition* at 2 and the following language: "[t]hus, whenever a member provided her cell phone number (*e.g.*, on-line, at a point of sale or on a client capture card), the consumer's express consent to receive a single, confirmatory, opt-in text message … was confirmed through his or her participation in clubbebe." *Id.* at n.13. Based on that language, opponents contend that bebe suggests, without fully articulating its argument, that the mere provision of a phone number constituted written consent. *Id.* at 4.

[28] *Id.* at 1, 4-5, 7.

[29] *Id.* at 7.

benefits of it.[31] Further, bebe asserts that the Meyer parties and other similarly situated individuals agreed to be bound by the full clubbebe terms and conditions, including consenting to bebe communicating with them using the information they voluntarily provided and consented to be called by bebe at any telephone number provided.[32] Bebe states that by their participation in clubbebe, including signing the receipts which reflected their membership number, the Meyer parties and other clubbebe members "manifested their assent to be bound by the written clubbebe Terms & Conditions."[33] Bebe additionally asserts that "the process by which customers enroll in clubbebe creates a contract between bebe and the customer, and the Terms and Conditions form the written contract between them."[34]

III. DISCUSSION

11. In this Order, we grant waivers to ViSalus and bebe as described more fully below. Specifically, we find good cause exists to grant individual retroactive waivers of section 64.1200(a)(2) of the Commission's rules to calls made on or before October 7, 2015 because petitioners have demonstrated that they are similarly situated to petitioners granted relief in the *2015 TCPA Declaratory Ruling*. We emphasize that these waivers do not apply to calls for which there was not some form of *written* consent previously obtained prior to the 2012 rule changes. After October 7, 2015, we find that each petitioner should have been in full compliance with the Commission's rules for each subject call.

12. The Commission may waive its rules for good cause shown.[35] A waiver may be granted if: (1) the waiver would better serve the public interest than would application of the rule; and (2) special circumstances warrant a deviation from the general rule.[36] Generally, the Commission or the Bureau, through properly exercised delegated authority, may waive Commission rules if the relief requested would not undermine the rule's policy objectives and would otherwise serve the public interest.[37] The Commission and the Bureau have each previously found that special circumstances similar to petitioners' warranted waivers.[38]

13. We find that the two petitioners before us have adequately demonstrated that they are

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[30] *Id.* at 6-8.

[31] *Bebe* Reply Comments at 1-5; *see also bebe Ex Parte* at 3-4.

[32] *Bebe* Reply Comments at 2. Bebe notes that enrollment in clubbebe is voluntary; no purchase is necessary; and the customer is not required to provide a mobile telephone number. *Id.* Bebe also points out that customers could enroll in clubbebe in a bebe store, on bebe.com, on bebe's mobile application or through bebe's customer service line. *Bebe* Reply Comments at 2-3.

[33] *Id.* at 3; *see also bebe Ex Parte* at 4. Bebe further notes that customers were required to complete their enrollment by sending a response "YES" text message to bebe (opt-in text message). *Bebe* Reply Comments at 3, note 3; *see also bebe Ex Parte* at 8. Bebe states that because its vendor filed for bankruptcy protection in 2013, it is not able to confirm whether individuals received an opt-in text message. *Bebe* Reply Comments at 4.

[34] *See bebe Ex Parte* at 4-5.

[35] 47 CFR § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

[36] *Northeast Cellular*, 897 F.2d at 1166.

[37] *WAIT Radio,* 418 F.2d at 1157.

[38] *2015 TCPA Declaratory Ruling,* 30 FCC Rcd at 8014, para. 101; *2016 Waiver Order,* 33 FCC Rcd at 11648, para. 12.

similarly situated to earlier waiver recipients.[39] Specifically, both petitioners assert that there was industry-wide confusion after the *2012 TCPA Order* went into effect, that they needed more time to obtain new consents under the *2012 TCPA Order*, and that they would benefit from a retroactive waiver.[40] Both have demonstrated that they incorrectly but reasonably interpreted the Commission's *2012 TCPA Order* by citing that order's language and the lack of evidence to refute their claimed confusion.[41] Finally, we note that neither petitioner is required to provide proof of actual confusion, consistent with our precedent, and there is no evidence in the record that challenges their claimed confusion.

14. While there is no dispute in the record that ViSalus obtained written consent for the calls at issue, the record indicates that bebe may not have done so for each such call.[42] As the Meyer parties point out, bebe describes one of its methods to get consent requiring only oral consent from the consumer when providing their telephone number.[43] In its reply, bebe is not clear whether it in fact obtained written consent under our earlier rule.[44] We thus emphasize that this waiver applies only to calls for which bebe obtained written consent.

15. Finally, we reject the other arguments of those opposing bebe's waiver. Consistent with previous waiver grants, we find the relief bebe seeks here is rooted in uncertainty in the Commission's 2012 order, irrespective of ongoing TCPA litigation.[45] We also find unavailing the argument that bebe merely seeks to avoid making a showing on consent it obtained for specific calls because the confusion bebe and others have demonstrated in seeking waivers is exactly the reason they cannot produce evidence of consent under the new rules.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j) and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 227, and sections 1.3, 64.1200 of the Commission's rules, 47 CFR §§ 1.3, 64.1200, and pursuant to the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 CFR §§ 0.141, 0.361, that the Petition for Retroactive Waiver and Request for Expedited Ruling, filed by ViSalus, Inc. in CG Docket No. 02-278 on September 14, 2017 IS GRANTED.

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[39] The Petitioners assert that there was industry-wide confusion after the new rule went into effect as to whether prior express consent obtained previously would remain valid, and stated they needed more time to obtain those new consents under the new rule without running the risk of being subject to litigation. *See Bebe Petition* at 8, 10-11; *ViSalus Petition* at 3-4, 7-8.

[40] *Bebe Petition* at 1, 8-10; *ViSalus Petition* at 1, 3-4, 7-8.

[41] *Id.*

[42] *See, e.g., bebe Petition* at 2 ("[t]hus, whenever a member provided her cell phone number (e.g., on-line, at a point of sale or on a client capture card), the consumer's express consent to receive a single, confirmatory, opt-in text message [] was confirmed through his or her participation in clubbebe."); *see also bebe* Reply Comments at 2-3 (noting that customers can enroll in clubbebe in a bebe store, on bebe.com, on bebe's mobile application, or through bebe's customer service line).

[43] *Id.*; *see also bebe Ex Parte* at 4 (noting that, as part of her enrollment, Ms. Barrett orally provided bebe with her information – including her mobile phone number – in a bebe store at the point of sale).

[44] *Bebe* Reply Comments at 2, 6-8; *see also bebe Ex Parte* at 3-4.

[45] *2015 TCPA Declaratory Ruling,* 30 FCC Rcd at 8014-15, para. 102; *see also 2016 Waiver Order,* 33 FCC Rcd at 11651, para. 19.

17. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j) and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 227, and sections 1.3, 64.1200 of the Commission's rules, 47 CFR §§ 1.3, 64.1200, and pursuant to the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 CFR §§ 0.141, 0.361, that the Petition for Expedited Declaratory Ruling Granting a Limited, Retroactive Waiver of 47 CFR § 64.1200(a)(2) of the Federal Communications Commission's Rules, filed by bebe stores, inc. in CG Docket No. 02-278 on November 18, 2016 IS GRANTED IN PART AND OTHERWISE DENIED to the extent indicated herein.

18. IT IS FURTHER ORDERED that this ORDER shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Patrick Webre
Chief
Consumer and Governmental Affairs Bureau

Appendix A

List of Commenters

The following parties filed comments in response to the two Public Notices issued in this matter (CG Docket 02-278):

Commenter	Petition	Abbreviation
Melita Meyer, Samantha Rodriquez, Courtney Barrett and the *Meyer* Classes	bebe	Meyer parties
bebe stores, inc.	bebe	

bold – filing reply comments only.